

No. 79209-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

GENE CHAMPAGNE, CARY BROWN, ROLAND KNORR,  
and CHRISTOPHER SCANLON, Petitioners,

v.

THURSTON COUNTY, Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONERS—  
CHAMPAGNE, ET AL.

---

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STATE OF WASHINGTON

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1       **I.       INTRODUCTION**

2           At the heart of this case is whether employees in the State of  
3       Washington have a remedy when an employer deprives them of the use  
4       of the wages they have earned. The Court of Appeals for Division II has  
5       opined that there is no such remedy so long as the wages are eventually  
6       paid. The Petitioners respectfully disagree and ask this Court to overturn  
7       that decision.

8       **II.       ASSIGNMENTS OF ERROR**

9           1.       First Assignment of Error: The Court of Appeals erred in  
10       concluding that Washington law does not provide a statutory remedy for  
11       an employer's failure to pay overtime wages in accordance with the time  
12       period specified in WAC 296-128-035. The Court of Appeals further  
13       erred in concluding that WAC 296-128-035 applies only to violations of  
14       minimum wage laws under RCW 49.46 and monetary damages are  
15       limited to circumstances in which an employer fails to pay statutory  
16       minimum wages.

17           Second Assignment of Error: While the opinion of the Court of  
18       Appeals expressed no position on the issue, the trial court granted  
19       Thurston County's motion for summary judgment on the grounds that  
20       wage and hour claims are subject to Washington's Tort Claims Act,  
21       RCW 4.96.010 and 4.96.020, and the requirements in RCW 36.45.010.  
22       As the notice provisions in the Tort Claims Act do not apply to statutory  
23

1 claims that do not sound in tort, the trial court's conclusions were in  
2 error.

3 **III. STATEMENT OF THE CASE**

4 This lawsuit was brought by several corrections officers,  
5 individually and on behalf of a class of similarly situated individuals.  
6 (Complaint, CP 3-4). The corrections officers contended that their  
7 employer, Thurston County, unlawfully delayed the payment of  
8 overtime. (Complaint, CP 5-7). Specifically, the corrections officers  
9 asserted that the County's practice of withholding the wage payments at  
10 issue for up to two months violates WAC 296-128-035. (Complaint, CP  
11 6).

12 The trial court granted summary judgment to the County because  
13 the corrections officers had not filed a tort claim notice with the County  
14 prior to filing the lawsuit. (CP 282-83). The corrections officers  
15 appealed the trial court's decision, arguing that their lawsuit against the  
16 County was a statutory claim, not a tort or contract claim. (CP 295-98).

17 The Court of Appeals Division II upheld the grant of summary  
18 judgment on different grounds. (Appendix to Brief of Appellant, A-5 to  
19 A-6). The Court held that employees have a remedy under Washington's  
20 wage-and-hour laws only where an employer has paid "no  
21 compensation" to an employee. (Appendix to Brief of Appellant, A-4).  
22 Because the employees in this case eventually received their wages, the  
23

1 Court concluded they had no claim under the law. (Appendix to Brief of  
2 Appellant, A-5).

3 **IV. ARGUMENT**

4 The linchpin of the Court of Appeals' decision is the Court's belief  
5 that an employer can deprive its employees of the use of wages they  
6 have earned without any consequences to the employer or remedy for  
7 the employees, so long as the wages are eventually paid. The Court's  
8 interpretation provides employers with interest-free use of funds that  
9 belong to employees, and it encourages employers to delay payments  
10 indefinitely, or at least until their employees file a lawsuit. The Court's  
11 decision that employees have no remedy for delayed payments  
12 contravenes Washington's wage-and-hour laws and longstanding public  
13 policy.

14 The Legislature "evidenced a strong policy in favor of payment of  
15 wages due employees by enacting a comprehensive scheme to ensure  
16 payment of wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152,  
17 157, 961 P.2d 371 (1998). This Court has repeatedly held that remedial  
18 wage-and-hour statutes should be "liberally construed to advance the  
19 Legislature's intent to protect employee wages and assure payment."  
20 *See, e.g., id.* at 159 (expansive interpretation of "willfully" withholding  
21 wages under RCW 49.52.050); *International Ass'n of Fire Fighters v.*  
22 *City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (expansive  
23 interpretation of "action" and "person" in RCW 49.48.030). *See also*

1 *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362  
2 (1991) (expansive interpretation of "wages or salary owed" in RCW  
3 49.48.030). In light of the strong policy of ensuring wage payment and  
4 this Court's expansive interpretations of wage-and-hour statutes, the  
5 Court of Appeals' decision should be overturned.

6 **A. Washington's Wage-and-Hour Laws Provide a Remedy**  
7 **for the Delayed Payment of Wages.**

8 Washington's wage-and-hour statutes and the interpreting  
9 regulations of the Department of Labor and Industries (DLI) do provide  
10 a remedy for the delayed payment of wages. In WAC 296-128-035, the  
11 DLI mandated that "all wages due shall be paid at no longer than  
12 monthly intervals to each employee on established regular pay days."<sup>1</sup>  
13 Thus, contrary to the Court of Appeals' decision, an employer is  
14 required to pay all of the wages due its employees within the designated  
15 time frame.<sup>2</sup>  
16  
17

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18 <sup>1</sup> WAC 296-128-035 has been amended since the filing of this lawsuit. The  
19 quotation is from the regulation as it existed at the time the lawsuit was filed. The  
20 amended regulation has not substantively changed this provision. The amended  
sentence reads: "An employer shall pay all wages owed to an employee on an  
established regular pay day at no longer than monthly payment intervals."

21 <sup>2</sup> Such intent could not be more evident. The DLI has published the time-of-  
22 payment requirements in three separate regulations. *Compare* WAC 296-128-035 with  
WAC 296-126-023 and WAC 296-131-010.

1 When a violation of the regulation is established, the Minimum  
2 Wage Act (MWA), RCW 49.46, the Wage Payment Act (WPA), RCW  
3 49.48, and the Wage Rebate Act (WRA), RCW 49.52, provide for civil  
4 enforcement remedies. *See Wingert v. Yellow Freight Sys., Inc.*, 146  
5 Wn.2d 841, 848-50, 50 P.3d 256 (2002).

6 RCW 49.46.090 of the MWA provides for monetary damages if an  
7 employer “pays any employee less than wages to which such employee  
8 is entitled under or by virtue of this chapter.” WAC 296-128-035, which  
9 was implemented under or by virtue of the MWA, specifies time-of-  
10 payment requirements for *all* wages.<sup>3</sup> As a result, the Court of Appeals  
11 erred when it concluded that the employees in this case were not entitled  
12 to a remedy for the delayed wage payments that are at issue in this case.

13 Although WAC 296-128-035 was specifically promulgated by the  
14 DLI under the authority of the MWA, this time-of-payment regulation is  
15 also enforceable under the WPA and the WRA. *See Wingert*, 146 Wn.2d  
16 at 848 (holding that the employer’s violation of a regulation  
17 promulgated under the Industrial Welfare Act with regard to rest breaks  
18 could be enforced through RCW 49.52.070 of the WRA). The WPA  
19 provides a remedy of back wages and attorney’s fees if an employer

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20  
21 <sup>3</sup> Among the substantive amendments to WAC 296-128-035, the DLI has  
22 specified time frames for the payment of “overtime wages,” which indicates that the DLI  
23 interprets the term “wages” expansively.

1 “withhold[s] or divert[s] any portion of an employee’s wages.” RCW  
2 49.48.030.<sup>4</sup> The WRA provides a remedy of double the “wages  
3 unlawfully rebated or withheld” if the employer acts willfully. RCW  
4 49.52.070.

5 RCW 49.52.070 is to be “liberally construed to advance the  
6 Legislature’s intent to protect employee wages and assure payment.”  
7 *Schilling*, 136 Wn.2d at 159 (citing *Brandt v. Impero*, 1 Wn. App. 678,  
8 682, 463 P.2d 197 (1969)). Nothing in WAC 296-128-035 or the WMA,  
9 the WPA, or the WRA supports the Court of Appeals’ distinction  
10 between nonpayment and delayed payment. Contrary to the Court of  
11 Appeals’ decision, damages must be available in both situations to  
12 assure that employers pay their employees as the Legislature intended.

13 The wage-and-hour statutes do not create a “safe harbor” period  
14 that allows employers to escape liability if they pay wages after they are  
15 due. Employers violate the statutes by paying a lower wage than is due  
16 to an employee. For the employer’s obligation to have any meaning, the  
17 wages must be paid by a designated pay date, a date which is supplied  
18 by WAC 296-128-035. The interpretation of the Court of Appeals would  
19 make the time-of-payment regulation superfluous, and courts must

20  
21  
22 <sup>4</sup> The DLI has been given concurrent administrative enforcement powers for  
claims under the WPA. *See* RCW 49.48.040-.070.

1 “construe a statute so that no portion is rendered meaningless or  
2 superfluous.” *See Lewis v. State, Dep’t of Licensing*, 125 Wn. App. 666,  
3 678, 105 P.3d 1029 (2005). For these reasons, the Court of Appeals  
4 erred in holding that Washington’s wage-and-hour statutes and the  
5 interpreting regulations do not provide a remedy for the delayed  
6 payment of wages.

7 The Court of Appeals also erred when it limited the application of  
8 WAC 296-128-035 to minimum wage violations, holding that the  
9 regulation does not apply to the WPA or the WRA. This interpretation  
10 directly contradicts the plain language of WAC 296-128-035 because the  
11 regulation specifically applies to “all wages due.” The significance of  
12 the term “all” has been recognized by this Court before. *Wingert*, 146  
13 Wn.2d at 848 (noting that WAC 296-126-092(4) did not distinguish  
14 between regular hours and overtime hours because it used the inclusive  
15 term “all”). Similarly, WAC 296-128-035 does not distinguish between  
16 minimum wages and other wages, but instead uses the inclusive term  
17 “all” to describe the wages. As a result, the Court of Appeals also erred  
18 when it limited the application of WAC 296-128-035 to minimum wage  
19 violations.

20 Should this Court find that WAC 296-128-035 is not explicitly  
21 enforceable through the WPA or the WRA, it should nonetheless  
22 construe the statutes in a fashion that creates a remedy for the delayed  
23 payment of wages. Only such a remedy will give full force and effect to

1 Washington's wage-and-hour laws. If the Court of Appeals'  
2 interpretation of WAC 296-128-035 were upheld, employers in effect  
3 would only be required to pay the minimum wage. Employers could  
4 withhold all other wages indefinitely because there would be no  
5 statutory time frame for payment. As a result, employees would not have  
6 a cause of action to recover any unpaid wages over the minimum wage  
7 because there would be no time at which the employer was statutorily  
8 obligated to pay the wages. Thus, employees would be left unprotected  
9 and subject to the employer's whim for payment of their non-minimum  
10 wages. This result directly contravenes the statutory scheme enacted by  
11 the Legislature, which demonstrates a strong commitment to ensuring  
12 that employees are paid. *Schilling*, 136 Wash.2d at 157.

13 Analogously, federal courts have inferred a time-of-payment  
14 requirement for the Fair Labor Standards Act (FLSA). The FLSA, like  
15 Washington's MWA, has no provision that specifically requires the  
16 payment of wages in a particular time frame. Also like Washington's  
17 MWA, the FLSA requires that "no employer shall employ any of his  
18 employees . . . for a workweek longer than forty hours unless such  
19 employee *receives* compensation for his employment" at the prescribed  
20 rate. 29 U.S.C. § 207 (emphasis added). While the FLSA does not  
21 explicitly require timely payment of wages, the mandate that employees  
22 "receive" compensation necessarily implies that they receive  
23 compensation by a particular day. Accordingly, courts have construed

1 the FLSA to provide a remedy for both nonpayment and delayed  
2 payment of wages under the FLSA. *See, e.g., Biggs v. Wilson*, 1 F.3d  
3 1537, 1542-43 (9th Cir. 1993). In *Biggs*, the Ninth Circuit held that  
4 “wages are ‘unpaid’ unless they are paid on the employees’ regular  
5 payday.” *Id.* at 1538 (finding a violation of the FLSA where the state  
6 paid employees two weeks after the regular pay day). *See also Brooks v.*  
7 *Village of Ridgefield Park*, 185 F.3d 130, 136-37 (3d Cir. 1999) (finding  
8 violation where compensation paid six weeks after regular pay day);  
9 *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944) (obligation  
10 to pay liquidated damages “immediately arises” when “an employer on  
11 any regular payment date fails to pay the full amount due”). The same  
12 solution should be adopted for Washington’s wage-and-hour laws if this  
13 Court finds that the statutes explicitly provide remedies for nonpayment  
14 only.

15 In sum, the civil enforcement provisions of the MWA, the WPA,  
16 and the WRA provide remedies when wage payments are delayed in  
17 violation of WAC 296-128-035. At the very least, a timely payment  
18 requirement should be inferred into the MWA to ensure that employees  
19 receive their wages as the Legislature intended.

1                   **B. Consequence-Free Delayed Payment of Wages**  
2                   **Contravenes Washington's Wage-and-Hour Policy.**

3                   When interpreting statutes, the Court will avoid an interpretation  
4                   that leads to an absurd result. *Anderson v. State Dept. of Corrections*,  
5                   159 Wn.2d 849, 864, 154 P.3d 220 (2007). The Court of Appeals'  
6                   interpretation does lead to such a result by providing an incentive for  
7                   employers to delay the payment of wages indefinitely, or at least until  
8                   their employees file suit.

9                   Taken to its logical conclusion, the Court of Appeals' decision  
10                  means that an employer can indefinitely delay paying its employees the  
11                  wages that the employees have earned. The employer could then put  
12                  those funds to a use that benefits the employer. For example, the  
13                  employer could use the funds to purchase goods and services, or it could  
14                  place the funds into an account that earns interest for the employer.  
15                  Under the Court of Appeals' decision, as long as the employer pays the  
16                  wages before the employees obtain a judgment, the employer escapes  
17                  any liability to the employees for the delay. The employer would not  
18                  even be required to pay interest, even though that is the generally  
19                  accepted method of compensating another for the use of his money.

20                  In effect, then, employers could finance their operation on the  
21                  backs of their workers, a result that flies in the face of Washington's  
22                  "long and proud history of being a pioneer in the protection of employee  
23                  rights." *International Ass'n of Fire Fighters*, 146 Wn.2d at 35. Such a

1 result is antithetical to Washington's "strong policy in favor of payment  
2 of wages due employees." *Schilling*, 136 Wn.2d at 157.

3 Providing a remedy solely for complete nonpayment of wages will  
4 encourage some employers to delay payment until the employees incur  
5 the costs of hiring an attorney and filing suit. At that point, according to  
6 the Court of Appeals' interpretation, the employer could pay the  
7 employees and thereby eliminate the cause of action.

8 The possibility that the employer could eliminate the cause of  
9 action by paying employees after a lawsuit is filed directly contradicts  
10 the Legislature's intent in enacting Washington's wage and hour laws. In  
11 enacting RCW 49.52.070, the Legislature provided employees with a  
12 mechanism for recovering litigation costs and attorney's fees, even  
13 where the action involves a small amount of wages. *See Schilling*, 136  
14 Wash.2d at 159. This provision of costs and attorney's fees demonstrates  
15 the Legislature's commitment to the correct payment of wages. Yet, if  
16 the employer's delayed payment eliminated the cause of action, the  
17 employees could not recover litigation costs and attorney's fees, thereby  
18 hindering their ability to enforce the statute as the Legislature intended.  
19 The Court of Appeals' decision failed to accomplish the goal of statutory  
20 interpretation, which is to "ascertain and give effect to the Legislature's  
21 intent and purpose." *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387,  
22 119 P.3d 840 (2005) (citing *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d  
23 512, 518, 91 P.3d 864 (2004)).

1       Moreover, an employer would be able to avoid the criminal  
2 sanctions in RCW 49.52.050 simply by paying the employee before the  
3 case went to trial. Thus, the Court of Appeals' decision enables  
4 employers to escape the consequences of their criminal actions by giving  
5 back what they wrongfully took. This result is analogous to letting  
6 shoplifters avoid criminal penalties as long as they give back what they  
7 stole when they get caught.

8                   **C. The Tort Claims Act Does Not Apply to Statutory**  
9                   **Wage-and-Hour Claims.**

10       The trial court erred in holding that the employees were required  
11 to file a notice of claim with the County before filing this statutory  
12 wage-and-hour lawsuit. This is true because RCW 4.96, commonly  
13 referred to as the Tort Claims Act, applies to common law tort and  
14 contract claims, but not statutory causes of action.

15       In enacting the Tort Claims Act, the Legislature waived sovereign  
16 immunity "to discourage *tortious* governmental conduct, and to hold  
17 government responsible for its acts." *Haberman v. Washington Public*  
18 *Power Supply Syst.*, 109 Wn.2d 107, 160, 744 P.2d 1032 (1987)  
19 (emphasis added). Division Three recently extended the claim-filing  
20 requirements of RCW 4.96 to common law breach of contract claims.  
21 *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 510, 84 P.3d 1241  
22 (2004). Prior to the trial court's ruling in this case, the Tort Claims  
23

1 Act's requirements have never been held to encompass anything other  
2 than common law tort and contract claims.

3 While the Tort Claims Act presents perhaps the most commonly  
4 cited waiver of sovereign immunity, the Legislature can also waive  
5 sovereign immunity by enacting a statute that provides for a private  
6 right of action against governmental entities. *See Wilson v. City of*  
7 *Seattle*, 122 Wn.2d 814, 823-24, 863 P.2d 1336 (1993). Where the  
8 Legislature has waived sovereign immunity by this second method, the  
9 Tort Claims Act no longer applies. *See id.* at 820 (stating that the Tort  
10 Claims Act does not apply to "special statutory remedies").  
11

12 Since the Legislature has opted to waive sovereign immunity in  
13 different ways, the reference to claims in RCW 36.45.010 and the Tort  
14 Claims Act is not as broad as the County asserts.<sup>5</sup> If a claim against the  
15 State is not authorized by the Tort Claims Act, and does not otherwise  
16 sound in tort or contract, but is instead authorized by another act of the  
17 Legislature, the statutory cause of action is subject to a claim-  
18

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19 <sup>5</sup> Other language in the Tort Claims Act supports the interpretation that the Act's  
20 requirements only apply to claims sounding in tort. *See* RCW 4.96.020(2) (requiring  
21 appointment of agent to receive claims for "damages made *under this chapter*")  
(emphasis added); RCW 4.96.020(3) (prescribing content of notice of claim "for damages  
22 arising out of *tortious conduct*") (emphasis added); RCW 4.96.020(4) (providing for a  
60-day waiting period after filing a notice of claim "for damages arising out of *tortious*  
23 *conduct*") (emphasis added).

1 filing requirement only if the underlying statute requires this. *Wilson*,  
2 122 Wn.2d at 824 (holding that the claim-filing requirements of RCW  
3 4.96 did not apply to a statutory cause of action under RCW  
4 64.40.020).

5 The claims in this lawsuit are not predicated upon the waiver of  
6 immunity in RCW 4.96 for tort claims. The claims are also not based  
7 on a contract.<sup>6</sup> Instead, the employee's claims are brought under  
8 Washington's separate and distinct wage-and-hour statutory scheme.  
9 The MWA, the WPA, and the WRA themselves constitute the  
10 Legislature's waiver of sovereign immunity because the statutes extend  
11 their coverage to governmental employers. *See Chelan County Deputy*  
12 *Sheriffs' Ass'n v. Chelan County*, 45 Wn. App. 812, 815-16, 725 P.2d  
13 1001 (1986), *rev'd on other grounds*, 109 Wn.2d 282, 745 P.2d 1  
14 (1987) (applying the MWA to County employees based on the  
15 definitions in RCW 49.46.010); RCW 49.48.115 (expressly including  
16 governmental employers in the definition of "employer" for the WPA);  
17 RCW 49.52.050 (expressly including public officials in the definition  
18  
19

20  
21 <sup>6</sup> The employees do not contend that the County has breached a contract of  
22 employment (the collective bargaining agreement). The employees rely solely on the  
23

1 of “employer” for the WRA). The employees in this case do not rely on  
2 the Tort Claims Act for the Legislature’s waiver of sovereign immunity  
3 because each of the wage-and-hour statutes that are the basis for this  
4 lawsuit independently apply to governmental employers.

5 The claim-filing requirements of the Tort Claims Act do not apply  
6 because an employee bringing a wage-and-hour claim against his  
7 governmental employer need not look to the waiver of sovereign  
8 immunity contained in the Tort Claims Act. Any procedural limitations  
9 would be contained in the wage-and-hour statutes themselves, and none  
10 of these statutes contain a claim-filing process. For these reasons, the  
11 trial court erred in dismissing the claims for failure to file a notice of  
12 claim with the County.

#### 14 V. CONCLUSION


15 The Court of Appeals’ interpretation of the wage-and-hour statutes  
16 and the related time-of-payment regulation strips workers of protections  
17 that mandate timely payment of the wages that they earn. The Court’s  
18 decision marks a regression in Washington’s strong tradition of ensuring  
19 that employees receive fair compensation for their work. For the  
20

21  
22 rights given to them under WAC 296-128-035 and the statutory enforcement provisions  
23 in the MWA, the WPA, and the WRA.

1 foregoing reasons, Petitioners respectfully request that this Court  
2 overturn the Court of Appeals' decision.

3 DATED this 20th day of August, 2007.

4 Respectfully submitted,

5 

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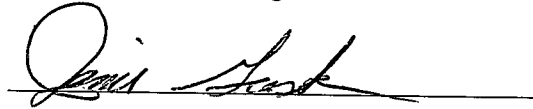
**GENE CHAMPAGNE, CARY BROWN,** ) Court of Appeals No. 34039-9-II  
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**THURSTON COUNTY,** )  
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I hereby declare under penalty of perjury according to the laws of the State of Washington that on this date I have caused a true and correct copy of Supplemental Brief of Petitioners—Champagne, et al. to be served via messenger on the following:

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5 Executed in Seattle, Washington this 20th day of August, 2007.

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7  
8 Jennie Gaston